No. 16,649

IN THE

United States Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,

Appellant and Defendant,

vs.

MILDRED MURPHY,

Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Appellee's Brief

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STATEMENT OF THE CASE

Appellant's statement of the case is substantially correct except that there is nothing in the record to indicate that the case was tried on the theory that Res ipsa loquitur was relevant. This is only wishful thinking on the part of the appellant. No instructions were offered on the theory and no reliance was or is had upon that theory by appellee.

Nor does plaintiff admit that there is a split of authority in California on the question of the degree of care owed by store keepers to their customers.

QUESTIONS INVOLVED

(1) Are Instructions given without objection the law of the case?

(2) May the appellant assign error, under Rule 51 of the Rules of Civil Procedure, in the giving of instructions to which it did not object?

(3) Is the evidence sufficient to sustain the verdict of the jury?

(4) Is the verdict against the weight of the evidence?

SUMMARY OF ARGUMENT

1. Appellant's tendered instruction Number 8 appearing at transcript 398 and the amendment offered by appellant to defendant's proferred Instruction Number 12 appearing at transcript 399 relating to the duty of a storekeeper in relation to waxing or polishing of his floors, not being objected to, became the law of the case, and were binding upon the jury.

2. Under Rule 51 of the Federal Rules of Civil Procedure appellant may not assign error for the giving, without objection by appellant, of the instructions referred to.

3. The evidence is sufficient to sustain the verdict of the jury both as to the negligence of the appellant and as to the amount of the damages.

4. The verdict is not against the weight of the evidence.

ARGUMENT

Because Judge Murray's order, denying appellant's motion for judgment in accordance with the motion for directed verdict or for a new trial (Tr. 12, 13, 14, 15, 16, 17, 18), covers so well and succinctly the principal questions raised in appellant's brief, appellee will not burden the court with a lengthy discourse on matters so well considered in the court's order. There are some arguments, however, in appellant's brief that will require some discussion as well as the citation of some additional authorities.

The argument will follow in the same order as in appellant's brief.

SPECIFICATION OF ERROR NUMBER I

The Instructions of the Court Given Without Objection Are the Law of the Case.

Appellant seeks by this specification to put the trial court in error for giving instructions to which appellant made no objection. This it may not do.

Rule 51, Federal Rule of Civil Procedure provides:

> "No party may assign as error the giving or failing to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The substance of Rule 51 is contained in Sec. 93-5101 Revised Codes of Montana, 1947.

The Montana Court in Ingman vs. Hewett, 107 Mont. 267, 271; 86 Pac. 2d 653 has stated the effect of the rule as follows:

> "The instructions constitute the law of the case which the jury is bound to obey. (citing cases). And a verdict contrary to the instructions is against the law, necessitating a new trial, and this even if the instruction be erroneous."

> See also Bush v. Chilcott, 64 Mont. 346, 353; 210 Pac. 907.

The Courts hold, under Rule 51, that the sufficiency of the evidence to sustain the verdict is to be tested by the law as stated in instructions not objected to even though the instruction be erroneous. National Surety Corporation v. City of Excelsior Springs, Mo. (CCA 8th, 1941) 123 F. 2d 573.

Appellee's instruction Number 8 appearing at page 398 and the amendment of appellant's instruction Number 12 appearing at page 399, clearly, as the court points out in its order (Tr. 13), adopt the rule of the following cases: Nicola v. Pacific Gas and Electric Co., 50 Cal.

App. 2d 612, 123 Pac. 2d 1013; Cagle v. Bakersfield Medical Group 110 Cal. App. 2d 77, 241 Pac. 2d 1013; Baker v. Mannings, Inc., 122 Cal. App. 2d 390, 265 Pac. 2d 96 and Chase v. Perry—Okla—326 Pac. 2d 809.

Appellant now urges that Judge Murray's statement in his order that the giving of appellee's instruction Number 8 and the amendment of appellant's instruction Number 12 made apparent that the Court was adopting the rule of the case last above cited is not correct. In effect, appellant is saying it did not object to the giving of these instructions because it did not realize the effect of the instructions.

Counsel seems to have forgotten that in accordance with Rule 10 (f) of the Rules of Procedure for the District of Montana,

> "Each requested instruction shall be numbered and written on a separate page, *together with a citation of authorities supporting the proposition of law stated in the instruction.*" (Emphasis supplied).

appellee cited in her instructions the authorities supporting the instructions and that on his copy of appellee's instruction Number 8 the Nicola case is cited as it was to the Court. Further, trial briefs were filed in which the cases mentioned in the order of the Court were cited and argued at length, as they were on the settlement of the instructions.

Appellant's position throughout its brief is that appellee must prove that appellant was negligent in its choice of materials used on the floor or in their application. This is the rule in jurisdictions not following the Nicola and Cagle cases and the instructions on their face clearly reject the rule contended for by appellant. This proof is not required under appellee's instructions Number 8 (Tr. 398) or the amendment to appellee's instruction Number 12 (Tr. 399) and the rule stated by the instructions is the rule of the Nicola, Cagle, Baker and Chase decisions.

The instruction Number 8 submitted by appellee reads:

> "Storekeepers are under the duty to keep the floors of their premises reasonably safe, as I say, for the people who are invited to pass over them. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the right, or to the duty to use ordinary prudence and caution to avoid injury to those who come upon the premises. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains reasonably safe for the invitee, for the people that the store owner, in this case, Safeway, invites into the store to do business."

The amendment to appellant's instruction Number 12 removes any doubt but that the court intended to reject

the rule contended for by appellant. The instruction is as follows, the amendment being italicized.

> "A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them, *or the creation of a dangerous slippery condition, so that thereafter the floor is not reasonably safe for its intended use by the customers in the store.*" (Emphasis supplied).

As the Court says the sufficiency of the evidence to support the verdict must be tested by the rule of these cases.

SPECIFICATION OF ERROR NUMBER II

Since the Instructions Adopting the Rule of the Nicola and Cagle Cases Were Given Without Objection, Appellant's Argument On Specification of Error Number II Has No Relevancy.

Because the instruction not objected to are the law of the case and because under Rule 51, Rules of Civil Procedure the appellant may not on appeal, urge that the adoption of the rule of the Nicola and Cagle cases was error, it is not necessary to discuss Erie v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 and the other cases cited by appellant on the question of the rules of decision. Appellee would like to point out, however, that the rule as to negligence of a storekeeper contended for by ap-

pellant is far from the universal rule the court found to exist in Werthan Bag Corporation v. Agnew (CA Tenn. 1953) 202 F. 2d 119, 124, 125, the case upon which defendant chiefly relies, as will appear from the cases cited later in this brief. Further, the true rule is that absent a precise and settled decision on a legal question by the state courts, the federal courts are not bound by the numerical weight of authority but they must seek to ascertain what the state court would do if it were passing on the precise question. Jackson v. Flohr (CA 9th, 1955) 225 F. 2d 607, Jackman v. Equitable Life Assurance Society, (CCA Pa. 1914), 145 F. 2d 945.

Montana's Code was adopted almost verbatim from the Code of California. Historically, Montana courts have looked with great respect on the decisions of the courts of California and have followed and adopted those decisions on questions of both statutory and common law. The Montana cases, cited by appellant on the duty of a storekeeper to the public, indicate strongly that the Montana Court would, on the facts here present, follow the California decisions.

SPECIFICATION OF ERROR NUMBER III

The Evidence Was Sufficient to Sustain the Verdict As to Appellant's Negligence.

As stated by Judge Murray in his order the sufficiency of the evidence is to be tested by the rule of the Nicola,

Cagle, Baker and Chase decisions. Further this court must be guided by the universal rule that in passing upon a motion for directed verdict,

> "The Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all inferences that are fairly deducible from them. (citing cases). Where uncertainty as to the existence of negligence arises from a conflict in testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." (citing cases).
>
> Guning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 233.

Upon review of determinations of fact made in the trial court "only the evidence and inferences favorable to the successful party will be considered" 5A CJS 222.

A further rule is that "the preponderance of the evidence may be established by a single witness as against a greater number of witnesses who testify to the contrary." Batchoff v. Craney, 119 Mont. 157, 172 Pac. 2d 308.

In the Batchoff case the court pronounces the additional rule guiding appellate courts that:'

> "Where the evidence is conflicting, but substantial evidence appears in the record to support the judgment, the judgment will not be disturbed on appeal,

and this is especially true when the court as here, has passed upon the sufficiency of the evidence on motion for a directed verdict and motion for new trial and has upheld its sufficiency." (Emphasis supplied).

Here the opportunity to observe the witnesses is of even greater importance than in the ordinary case where only the credibility of testimony is involved.

In determining the question of the cause of the fall, the jury could be guided by appellee's physical appearance. Had she been overweight, awkward, crippled or otherwise handicapped, it would have been more likely that her fall might have been caused by something other than the slipping. The jury and the court had an opportunity to see the appellee, an opportunity this court does not have.

The opportunity to observe the witnesses is also important here in that the janitor, Rodoni, demonstrated how he applied the wax (Tr. 325). Judge Murray, who saw the demonstration, in his order referred to the demonstration and said the jury "saw this evidence and could have found negligence in such method of application." This court does not have the opportunity to observe this demonstration which was an important part of appellee's case.

With these basic rules in mind we turn to an examination of the testimony supporting the verdict.

On June 24, 1958, appellee Mildred Murphy entered appellant's store in Butte, Montana, to buy groceries. (Tr. 25, 28). She walked past the check stands and was passing the produce counter on the way to the coffee stand when she fell. (Tr. 31). She was walking in a normal manner 'not too fast' when both feet 'shot out in front' of her and she fell 'flat' on her 'back and head.' (Tr. 31, 37). She was wearing medium heel shoes (Tr. 31). She observed that the floor was 'real shiny' in the area where she fell and that she had never seen it so shiny, (Tr. 3). She did not stumble nor was she stopping or turning. (Tr. 36, 37). She heard her head hit the floor. (Tr. 37, 38). An employee of the appellant, Ledingham, some twenty feet away heard the 'thump' of appellee's head hitting the floor (Tr. 307, 311). Another employee 20 to 25 feet away heard the thud. (Tr. 288). The employee Squires heard the fall 30 to 40 feet away (Tr. 242). Appellant was dazed and a bump immediately rose on the back of her head (Tr. 41). She suffered immediate severe pain in her neck and lower back (Tr. 42). Her testimony as to the immediate effect of the fall is corroborated by the appellant's witnesses Frazer, and Ledingham.

Appellee believes if there were not other testimony the violence of the fall and the attending circumstances are sufficient to show, within the instructions, the floor where appellant fell was dangerously slippery.

This court considered a fact situation exactly the same as here in the case of Allen v. Matson Navigation Company (CA 9th, 1958) 255 F. 2d 273, 280. In making his order, Judge Murray quoted the following language from that decision:

> "Although the mere fact that Mrs. Allen fell would by itself be no evidence as to why she fell, yet the circumstances of how she fell, when considered with the other evidence in the case, has considerable significance. The witness who saw Mrs. Allen fall, as well as Mrs. Allen herself, testified that as Mrs. Allen walked across the landing, both her feet flew straight out in front of her and up into the air while she fell with a thud upon her back. That is at least some evidence that hers was a slipping fall."

This fall apparently was even more violent than suffered by the injured person in that case. The violence of the fall establishes that appellee fell as a result of slipping. In order for her to have slipped she must have been walking on a slippery surface and in view of the violence of her fall it must have been dangerously slippery. Appellee was walking slowly. She was wearing low heeled shoes in good condition. She did not stumble. (Tr. 36). She was not turning or stopping. As Judge Murray points out in his order, appellant possesses "a considerable degree of adroitness afoot." (Tr. 16). There was nothing to trip over or to slip on but the waxed surface of the floor. The floor had been waxed the night before. (Tr. 327). But one inference can be drawn and

that is that the floor was in a dangerously slippery condition. The jury could believe and had to believe, based on their common experience that no one could fall as did appellee if the floor were not dangerously slippery. The testimony set out above, alone "excludes every other reasonable hypothesis" to explain the fall. Fegles v. McLaughlin Construction Co. (CA 9th) 205 F. 2d 637.

But there is other testimony sustaining the conclusion of the jury, under the instructions, that the floor was in a dangerously slippery condition by reason of the waxing. That testimony is epitomised in the order of the court denying the motions.

Appellant maintains in its brief there was no testimony that the wax, through repeated applications, tended to build up. Judge Murray thought otherwise. (Tr. 14). For many years the whole floor, including the spot where appellee fell was waxed twice a week and appellant's manager said it tended to build up (Tr. 182) and that it was necessary to scrape it off and that it had last been removed some two months before appellee fell (Tr. 176). The janitor Rodoni testified it was necessary to remove accumulated wax with lye. (Tr. 331). He says it would build up even where people walked, apparently meaning in the aisle proper. (Tr. 32). There is evidence that the spot where appellee fell gets less traffic than other parts of the floor, (Tr. 334) and that the spot where she

slipped was not in the middle of the aisle but toward the edge where the traffic was lighter.

This the trial Judge could observe from the demonstrations and descriptions, which of necessity do not appear in the record. There is testimony that liquid wax as it builds up, tends to become more slippery. (Tr. 382).

That the spot where appellee fell was not subject to heavy traffic is further established by the testimony of appellant's employees that the spot is no longer waxed twice a week because the wax does not wear out so quickly there as in other parts of the store.

As the trial court pointed out in its order (Tr. 15) the evidence of the change in the practice as to the frequency of waxing was put in by defendant's witnesses. There was no objection to the testimony and the jury could consider it in passing on the principal question of negligence.

Finally the appellant itself had the janitor Rodoni demonstrate the manner of application of the wax. This Court must assume that the demonstration was such that the jury could infer negligence in the application of the wax. And it did. The janitor was required to sprinkle one quart of wax from an ordinary garden sprinkling can over the entire area of store, some 2,500 square feet. (Tr. 325). To do so he had to practically run backward as indicated by the testimony (Tr. 325). The trial court

which saw the demonstration concluded the jury might have determined, after viewing this demonstration, that there was negligence in the application of the wax. As a conclusion to the discussion of the evidence as to negligence, appellee believes the best answer to appellant's whole assignment is found in the following language from Judge Murray's order appearing at page 17 of the Transcript.

> "Counsel for defendant points to the lack of evidence in this case that there was a skid mark on the floor, or that there was after the fall, wax on the plaintiff's shoes or clothes, such as is found in some slip and fall cases. However, in those cases such evidence merely tends to establish an accumulation of wax on the floor, and that the plaintiff slipped on such wax, and is but one type of evidence establishing those facts. Here there was other types of evidence from which the jury could infer those facts. There is the evidence of the manager and the janitor that the wax tends to build up, that the floor had not been dewaxed for two months prior to the plaintiff's fall; that since the accident the number of waxings of the floor at the point of plaintiff's fall had been reduced, and the manner in which plaintiff fell as indicating a slipping fall.
>
> "The question of defendant's negligence was for the jury, and in the Court's view there was ample evidence to support the jury's finding on that question, and its verdict will not be disturbed."

Under the following decisions and under many of

the cases relied upon by appellant the evidence is sufficient to sustain the verdict.

Nicola v. Pacific Gas and Electric Co., 50 Cal. App. 2d 612, 613, 123 Pac. 2d 529. Here there was testimony of other witnesses that in their opinion the floor was slippery but what is said as to the question here presented is apt and we quote from that decision.

> "Appellant's argument goes further to assail the finding that the floor was maintained by defendants in a negligent manner, and they rely upon a rule, which has been followed by some courts in other jurisdictions that the duty of an owner to exercise ordinary care is not violated by merely oiling or waxing and polishing a floor in the usual way, although the floor is rendered slippery thereby. (Citing cases).
>
> This is contrary to the settled law as announced by our own courts."
>
> "Of course, slipperiness is an elastic form. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. *This is a question of fact.* The trial Judge could well have believed, from the evidence, that the surface of the floor was sufficiently hard and smooth to become unsafe with the application of wax, or soft soap and water as they were used by appellants * * *. * * * it was for the trial Judge to determine, *as a fact,* whether the condition was one which afforded reasonable safety to defendants patrons or, in other words, whether defendants

had exercised ordinary care with respect to the condition of the floor. Perhaps it would have been an entirely justifiable conclusion that the floor, although slippery, was reasonably safe for public use or that defendants used ordinary care with respect to its condition, but *those questions of fact* have been decided to the contrary upon substantial evidence, and we could not, even if we were so inclined, substitute our judgment for that of the trial judge." (Emphasis supplied).

In *Baker vs. Mannings, Inc., Calif. App., 265 Pac. (2d) 96* the Court points out that the jury might have inferred negligence from a number of different items of testimony. The testimony there was that the portion of the floor where the plaintiff fell was less used than other portions of the floor, that testimony being practically the same as in the instant case. There was also testimony, as in the instant case, that wax tended to build up and accumulate on the less used portion of the floor and that excessive amounts of wax could produce a slippery and dangerous condition. The Court said that from these two items of testimony and from the fact that the floor had been waxed for 80 successive weeks, (here the floor had been waxed twice a week for two years prior to plaintiff's fall), negligence could be inferred, citing the Nicola case. In the Baker case there was testimony that there was an eraser like streak on the floor and a streak of wax on the side of plaintiff's shoe. That was only one of the factors, the Court said, that could be considered in deter-

mining negligence, and the existence of that testimony was not made the basis of the reversal of the lower Court's instructed verdict.

"In *Cagle vs. Bakersfield Medical Group, 110 Cal. App. (2d) 77, 241 Pac. (2d) 1013,* the same argument was made as made by the defendant here, that there was an obligation on the part of the plaintiff to show specific negligence in the manner of applying the wax and some departure from the ordinary custom of waxing floors. The argument was rejected by the Court. There the wax had been applied ten days before the plaintiff fell. There was no evidence that others had fallen on the floor, as was true in the Nicola case. The Court said, in discussing the Nicola case, that:

> "From the decision in that case it might be held that under proper circumstances, considering the type of floor and the type of patrons using the floor, a jury might well find that the application of any wax at all might be a violation of the duty to use ordinary prudence and caution to avoid injury. (Citing cases)."

In conclusion the Court said:

> "If we assume the existence of the facts and inferences most favorable to the plaintiff, we must conclude that the jury believed that the plaintiff, while walking in an ordinary and prudent manner, slipped and fell on a highly polished, slick and slippery floor which had been maintained in a slippery condition by the defendants over a period of several weeks by the application of an excessive amount of wax to the

floor. There being substantial evidence of these facts in the record, the question was for the jury alone to decide whether defendants were negligent, and whether or not defendants had notice of such condition."

In Western Union v. Blakely—Miss.—140 So. 336 the plaintiff fell on a floor she claimed was wet from mopping. Defendant claimed the floor had not been mopped but plaintiff testified she saw mop marks. In sustaining the jury's verdict the court said:

"In our opinion, this evidence is for the jury's decision, and if the jury believed from the evidence that the floor was wet and slick, as testified to by the plaintiff and it was an unsafe place for a person to walk, the recovery should be upheld. It was the duty of the Telegraph Co. to have the office in which the public are invited to transact business with and for the benefit of the company, kept in reasonably safe condition."

In the case of Moore v. Great Atlantic Pacific Tea Co., ____Mo.____ 92 S.W. 2d 912. Plaintiff fell on a floor recently cleaned with a product called Climalene. Plaintiff testified Climalene tended to make a floor slippery and the court held the question of negligence to be for the jury.

The court's attention is called to the following cases in addition to those cited above which reject the argument that negligence in choice of materials and in their application must be shown to establish negligence.

Ten Ball Novelty and Manufacturing Co. vs. Allen ____Ala.____, 51 So. 2d 690;

Shipp v. 32nd St. Corp. 30 N.J.L. 518 33 Atl. 2d 852;

Gill v. Meir and Frank Co. ____Ore.____, 303 Pac. 2d 21;

Taylor v. Northern States Power Co., ____Minn. ____ 264 N.W. 139;

O'Connor v. J. C. Penney Co., ____Minn.____ 2 N.W. 2d 419;

Gray v. Fitzgerald and Platt, ____Conn.____, 127 Atl. 2d 76;

Charles v. Commonwealth Motors, 195 Va. 576, 79 S.E. 2d 594.

We have examined appellant's cases and in each one of them the decision is based on the rule that negligence in the choice of materials or application must be shown, or the proof does not measure up to that existing here.

Typical of the cases cited by appellant are Vaughn v. Montgomery Ward 95 Cal. App. 2d 553, 213 Pac. 2d 417 and Hanson v. Lincoln First Federal Savings and Loan Ass'n. 45 Wash. 2d 577, 277 Pac. 2d 344.

In the Vaughn case the court says, "There is no evidence that the floors were recently oiled or waxed." Further, since plaintiff claimed she fell on a spot of oil that defendant had not put on the floor she had to show defendant knew of its presence and this she did not know.

The Vaughn decision cites as the law the Nicola decision. It does not overrule it.

In the Hanson case the floor, in the language of the court, "had not received a new application of wax for eight days before the accident." The clear inference is that if it had, the jury could have found negligence.

How the case of Scribner v. Bertmann, 129 Cal. App. 2d 204, 276 Pac. 2d 697 has any relevancy, we cannot see. The trial court let the case go to the jury which held for defendant on the facts. The most the case does is to indicate the doctrine of res ipsa loquitur should apply in slip and fall cases.

SPECIFICATIONS OF ERROR III and IV.

The Verdict Is Not Against the Clear Weight of the Evidence

What has been said as to the evidence and the rule of the Nicola and Cagle decisions covers appellee's argument that a new trial should have been granted on this specification on the question of negligence. Judge Murray carefully considered the evidence, found the verdict was not contrary to its clear weight and in his discretion determined that it was not necessary to grant a new trial to prevent a miscarriage of justice. Appellant admits that under the Nicola and Cagle decision the evidence does support the verdict and that the verdict is not under these decisions, against the clear weight of the evidence. Appellant's brief 53, 54.

THE VERDICT IS NOT EXCESSIVE

Again the appellant complains in this section of its brief about the instructions. In its brief at page 55 it says,

No instruction on the "criterion to be used in determining loss of future earnings was given." Appellant did not object because no such instruction was given.

The instruction in point is found at transcript, page 402. The Court after charging that if the jury found for plaintiff it must fix the damages for various items, says the jury shall determine:

> "3. The reasonable value of time lost, if any, from employment by the plaintiff since her injury wherein she has been unable to resume her occupation. In determining this amount, you should consider evidence of the plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned in the time lost had she not been disabled, if you find she is so disabled. If you should find that the plaintiff's power to earn money has been so impaired by the injury in question that she will suffer a loss of earning power in the future from that impairment, then you will award her such sum as will compensate her reasonably for such future detriment as she is reasonably certain to suffer. Even if a person was not gainfully employed at the time of the alleged wrongful conduct whereby she was injured, if a partial or total disability resulting from such injury is reasonably certain to continue for any period of time in the future, the

person, nevertheless, could suffer pecuniary loss, then, from the disability."

The complaint seeks $45,000.00 for permanent loss of wages and earning capacity (Tr. 5). Appellant admits that appellee proved earning capacity of $78.00 per week and estimates that $20,851.50 is the amount the jury allocated to loss of future earnings or earning capacity. This is less than one-half the amount claimed. In order to have earned $20,851.50 at a wage of $78.00 per week, appellee would have to work 267 weeks or 5 years. An award which contemplates such a short life expectancy could hardly be said to indicate that in fixing damages the jury was actuated by passion or prejudice.

Chenoweth v. Great Northern Ry. Co. 50 Mont. 481, 487, 148 Pac. 330 is cited by appellant in support of the proposition that, absent evidence as to the mortality table, the award of damages for future loss of earnings capacity may not stand. The decision is not authority for this proposition. The basis for the decision in the Chenoweth case is that the amount awarded for loss of earning capacity invested at four percent (4%) would return throughout the plaintiff's life time more than his proven earnings and the $25,000.00 would still remain to be distributed to his heirs at his death. Further,

"though the trial court submitted 29 instructions, some of which of necessity were involved and demanded painstaking consideration, the jury returned this verdict for $25,000.00 within thirty minutes from

> the time the case was submitted to them. The trial court, determined that the verdict is excessive and plaintiff acquiesced in that conclusion by offering to remit $10,000.00 from the amount."

Upon these facts the Court determined that the jury verdict was based upon passion and prejudice. The jury in the instant case was out for many hours, and even came back for further instruction. (Tr. 407).

Instead of the rule being in Montana that courts may not take judicial notice of the standard mortality table, the rule is otherwise. In McNair v. Berger, 92 Mont. 441, 458, 15 Pac. 2d 834, the Montana Court says:

> "The American Table of Mortality is a standard table, of the contents of which the courts will take judicial notice."

Appellant itself has very properly called the court's attention to American Legion Post No. 90 v. First National Bank and Trust Company (CA 2d, 1940) 113 F. 2d 898 and 5 Moore's Federal Practice 1343 sec. 4309. The holding in the American Legion Post No. 90 case is that,

> "it seems * * * that while an appellate court is not obligated to notice matters not brought to the attention of the trial court, * * * yet it may take such notice where necessary either to affirm, or to show the impropriety of, a decision below."

Mildred Murphy was fifty years old at the time this cause was tried. The Commissioners 1941 Standard Ordi-

nary Mortality Table in use by all insurance companies, give the life expectancy of a person at age fifty as 21.87 years. The testimony of appellee beginning at page 52 shows that she had an excellent employment record, having worked 27½ years in one establishment, that her prospects for future employment were excellent, that she had considerable seniority in the union, that up until the time of the accident she had no difficulty carrying heavy trays or doing any of the most difficult work in connection with her employment and that she would be employable for many years to come. All of the evidence taken together establishes without question that the award for loss of further earnings or for destruction of earning capacity, far from demonstrating passion and prejudice, shows the most conservative approach by the jury.

The case of Southern Pacific Co. v. Guthrie (CA 9th) 180 F. 2d 295, 186 F. 2d 932, cited by appellant in opinions written by Judge Pope, considers and disposes of every argument made by appellant on the question of the size of the verdict. There the plaintiff was a railroad man almost 59 years old. His proven earning capacity exceeded appellee's by only $1,200.00 per year. The award in that case for loss of future earnings approximated $70,-000.00. To arrive at that f,gurei the effect of income taxes in reducing the earnings had to be eliminated. In exhaustive opinions covering the power of the appellate court to overrule the action of the trial court in denying a new

trial, the court sustained the verdict. We close this brief with the following quotations from the decision on rehearing in that case.

> "The record contains no proof of any appeal to passion and prejudice, which, under some authorities would be essential before such a conclusion could be reached. Larsen v. Northwest Railway Co., 7 CA 171 F. 2d 841, 845. And even if an imputation of passion and prejudice could arise from the mere size of the verdict this case does not fall into any such category."

The court concludes:

> "We cannot here reverse the action of the trial court unless the verdict can be said to be 'grossly excessive' or as stated in the Affolder case, 'monstrous'."

CONCLUSION

Appellee respectfully submits the motions were properly denied and the judgment should be affirmed.

Respectfully submitted,

Attorney for Appellee.